84-1914 (1)

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BERNETTE FLOYD JACKSON

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI - CRIMINAL CASE

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45 pp

QUESTION PRESENTED FOR REVIEW

Whether the Fourth Circuit Court of Appeals erred in holding that a failure to deposit checks payable to the United States violates 18 U.S.C. §649, which imposes criminal liability for failure to deposit "money of the United States."

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OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals will be published. A copy of the opinion is included in the Appendix at A-1. The United States District Court for the District of South Carolina did not issue an opinion

JURISDICTION

The defendant was convicted in the United States District Court for the District of South Carolina of nineteen (19) violations of Title 18, United States Code, §649 on September 28, 1983. In an opinion of the Fourth Circuit Court of Appeals (which opinion will be published) the conviction was affirmed on April 9, 1985. Jurisdiction of the Supreme Court is invoked pursuant to Title 28, United States Code, §1254.

STATUTORY PROVISIONS INVOLVED

Petitioner was convicted of violating 18 U.S.C. §649. The issue presented by this Petition involves the proper interpretation of the term "money" in the first sentence of subsection 649(a). Section 649 provides:

> (a) Whoever, having money of the United States in his possession or under his control, fails to deposit it with the Treasurer or some public depository of the United States, when required to do so by the Secretary of the Treasury or the head of any other proper department or agency or by the General Accounting Office, is guilty of embezzlement, and shall be fined in a sum equal to the amount of money embezzled or imprisoned not more than ten years, or both; but if the amount is $100 or less, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> (b) This section and sections 643, 648, 650, and 653 of this title shall apply to all persons charged with the safe-keeping, transfer,or disbursement of the public money, whether such persons be charged

as receivers or depositories of the same.

In considering the proper intepretation of section 649, it is important to consider two statutes which address related conduct -- 18 U.S.C. § 641 and 18 U.S.C. § 648. These two sections provide:

> §641. Whoever embezzles, steals, purloins or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any Department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted--
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value

of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par or market value, or cost price, either wholesale or retail, whichever is greater.

§648. Whoever, being an officer or other person charged by any Act of Congress with the safe-keeping of the public moneys, loans, uses, or converts to his own use, or deposits in any bank or exchanges for other funds, except as specially allowed by law, and portion of the public moneys entrusted to him for safekeeping, is guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged, and shall be fined in a sum equal to the amount of money so embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

Bernette Jackson was indicted for nineteen (19) counts of violating 18 U.S.C. §649 by failing to make timely deposits of "money of the United States." The government charged that these failures occurred while Jackson

> "was employed as a unit collection officer in the United States Forestry Service in Columbia, South Carolina. Her duties included receiving funds remitted to the Forestry Service in payment for timber, maps, and recreation permits sold to the general public. The government alleged that from October 1981 through October 1982 Jackson failed on nineteen occasions to deposit remittances aggregating $759,116.77. Of this total, only

> $135 was indisputably in cash and $584.10 was by undetermined method of payment; the balance was remitted by check. Jackson negotiated none of the checks; in fact the government introduced no evidence that she appropriated any of the funds for personal use."

United States v. Jackson, ____2d____, (1985) (A copy of this opinion is included in the Appendix at A1 and the language quoted above is found at Page A2-A3)

Jackson contended at trial and on appeal that since section 649 addresses the failure to deposit "money of the United States," she could not be convicted of violating this section for failure to deposit checks. However, this interpretation was rejected at trial and she was convicted on all nineteen counts.

This interpretation was also rejected on appeal and her convictions were affirmed. United States v. Jackson, supra at (Appendix at A-13).

If section 649 had been construed to include only cash, she could only have been convicted of conceivably two counts, because only two instances of failure to deposit undisputably involved cash. Moreover, the jury might have acquitted her entirely since they may have viewed two instances of failure to deposit a small amount of money as mere inadvertence or negligence.

ARGUMENT -- REASONS FOR GRANTING WRIT

The United States Supreme Court should grant this petition because the decision of the Fourth Circuit construing Section 649: (1) is in direct conflict with a recent opinion of the Tenth Circuit; (2) is erroneous; (3) significantly and improperly alters the statutory scheme addressing misappropriation of federal funds; and (4) can be corrected without a substantial commitment of judicial resources.

I. Conflict Between Circuit Courts of Appeal

The issue presented by this petition is whether the phrase in 18 U.S.C section 649 -- "money of the United States" -- includes not only currency and coin but also checks payable to the United States. The Tenth Circuit Court of Appeals held in United States v. Fernando, 745 F.2d 1328 (10th Cir. 1984) that checks were not

included. However, the Fourth Circuit Court of Appeals explicitly rejected the reasoning in Fernando and held in Petitioner's case that checks were included in the term "money." United States v. Jackson, ___F.2d___,___(1985) (Appendix at A-13).

The conflict between circuits is clear and direct. The facts of Fernando and Jackson are not only relatively simple and undisputed but also remarkably similar. In both, checks were simply set aside and not deposited; the funds were arguably not misappropriated for the use of either defendant. Even the amounts are virtually the same -- $759,116.77 in Jackson and $786,865.66 in Fernando. This direct conflict between the Fourth Circuit and the Tenth Circuit is an important consideration in determining whether to grant a writ of certiorari. Supreme Court

Rule 17(a) specifically provides that conflict between circuits is a relevant factor. In addition, cases have relied on this factor in granting certiorari. E.g., FTC v. Flotill Products, 389 U.S. 179, 181 (1967) ("Because of a conflict with decisions of other courts of appeals ..., we granted certiorari....")

II. The Fourth Circuit's Erroneous Interpretation of Section 649.

Another reason that certiorari should be granted is respectfully that the Fourth Circuit's construction of Section 649 is erroneous. As a result, Petitioner's conviction constitutes manifest injustice which should be corrected.

The interpretation of statutes is not a mechanical process. However, a number of principles or guidelines have been developed to structure statutory construction. Many of these guides are

not applicable herein. For example, prior constructions are not pertinent because Fernando and Jackson are the first cases to construe explicitly the scope of the term "money" in Section 649. However, there are three specific guides that are relevant to the interpretation of Section 649: (1) plain meaning of the statute; (2) strict construction of a penal statute; and (3) legislative intent and the public interest protected by the statute.

A. The Plain Meaning of the Term "Money"

In Fernando the Tenth Circuit concluded that the plain meaning of "money" did not include checks. 745 F.2d at 1329. This conclusion was based on the Uniform Commercial Code definition of "money" and the definition in Black's Law Dictionary (5th Ed. 1979).

In Jackson, the Fourth Circuit rejected Fernando and contended that the statutory text of Section 649 provides "little guidance" to the meaning of the

term "money" __F.2d at __ (Appendix at A-6). This position was reached by using three distinct techniques to avoid the Fernando view concerning plain meaning.

First, the Uniform Commercial Code definition was simply not mentioned.

Second, subsection 649(b) was utilized to argue for an expansion of the definition of "money" in subsection 649(a). Subsection 649(b) provides

> This section and sections 643 648, 650 and 653 of this title shall apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money, whether such persons be charged as receivers or depositories of the same.

The Fourth Circuit used the reference to "the public money" in Subsection 649(b) to argue "the statute is concerned not with the form of the funds but instead with the public revenues of whatever form." __F.2d at_____ (Appendix at A6-A7). Having stretched "money" to mean "the public

money", the Fourth Circuit was able to argue that Black's Law Dictionary supported its interpretation because "public money" is defined in Black's as "revenue" without limit to form.

This shift from "money" to "public money" is insupportable. The initial problem is that the terms are different. In addition, the delineation of the persons covered in subsection 649(b) is necessarily broader than the conduct prohibited in subsection 649(a). Subsection 649(b) addresses not only subsection 649(a) but also other sections, which are broader in scope. For example, Section 648 specifically refers to "public moneys." Consequently, it is understandable that subsection 649(b) also uses the broader term of public moneys because it had to be drafted to include all custodians. Thus, there is no reason

to assume that subsection 649(b) is meant to expand the ordinary meaning of the term money in Section 649(a).

The final approach used by the Fourth Circuit in expanding the ordinary meaning of money was to quote selectively from Webster's New Collegiate Dictionary (1979). Webster's defines money as "something generally accepted as a medium of exchange, a measure of value, or a means of payment: as a: officially coined or stamped metal currency b: MONEY OF ACCCOUNT c: PAPER MONEY..." Id at 736. By deleting not only the reference to medium of exchange and measure of value but also the listing of the types of payment that would count as money, the Fourth Circuit argued that "Webster's also defines money as 'something generally accepted as a ... means of payment.'" _____ F.2d at

(Appendix at A-7). Such selective quotation makes it possible to alter the ordinary meaning of "money". However, it is clear from the unedited definition that checks are not included in the ordinary meaning of "money".

B. Strict Construction of Penal Statutes

In Fernando the Court began its

> "analysis by recognizing that it has long been settled that "'penal statutes are to be construed strictly,'... and that one' is not to be subjected to a penalty unless the words of the statute plainly impose it.'"... The words of §649 do not plainly impose liability for failing to deposit negotiable documents. 745 F.2d at 1329.

The Fourth Circuit did not address the construction of Section 649 in terms of this canon of strict construction of penal statutes. Had it done so it would have been difficult to support its holding, particularly since it had already determined that the language of the statute provided "little guidance" to a citizen. See ___F.2d at___ (Appendix at

A-6).

C. The Legislative Intent and Public Purpose

Both Fernando and Jackson focus on legislative intent and public purpose in construing Section 649. Normally, the first step in such a consideration is an analysis of legislative history. However, such a contemporaneous record is lacking for Section 649. Consequently, different approaches were required.

In Fernando, the Tenth Circuit stressed four factors.

> ...[A] logical basis exists to infer that Congress intended the statute to apply only to currency, rather than checks and other negotiable instruments. First, the term "money" has been in the statute for a long time, from a period during which checks were not used as commonly as today; Congress has changed this act several times but never expanded the term. Second, state courts have interpreted "money" in somewhat analogous criminal

statutes as not including checks. Third, and most importantly, Congress could have envisioned that a much greater harm would result if a government official failed to deposit currency than if the same official failed to deposit negotiable documents such as checks. In the case of currency, its immediate liquidity provides the official with a variety of uses for the money, none of which could be traced so long as the official ultimately deposits the money. In the case of checks, however, the government official has little opportunity to misuse the funds they represent without negotiating the checks. Once the checks are negotiated, ample evidence would exist from which the government could bring an independent claim for conversion. See 18 U.S.C. §641 (proscribing the embezzlement, theft, or conversion of "any record, voucher, money, or thing of value to the United States"). Thus, it may be fair to assume that Congress, perceiving the possibility that misuse of currency could occur more easily, intended the scope of §649 to be restricted to currency only and not to include negotiable documents. Finally, the existence of other criminal statutes, such as 18 U.S.C. §641, which has a scope clearly broad enough to make criminal

> any conversion to personal use of checks as well as money persuades us that a broad reading of the term "money" is not imperative. 745 F.2d at 1330 (Emphasis added)

The Fourth Circuit rejected the Tenth Circuit's conclusion about intent and policy. The comparison of section 649 with other statutory provisions was rejected as irrelevant because the Fourth Circuit felt that the "statutes compared in Fernando were not enacted pursuant to any integrated legislative plan." ___F.2d at ___ (Appendix at A-10).

The language and interpretation of analogous state statutes were not considered by the Fourth Circuit.

In considering the purpose of Section 649, the Fourth Circuit's analysis consisted of two arguments. First, the Court argued that cash was no different from checks. Second, it argued that the use of checks is so widespread today that

a narrow, literal reading of Section 649 would provide no protection for improper failure to deposit checks.

In making these arguments, the Fourth Circuit ignored the Tenth Circuit's reasoning in Fernando. For example, the Fourth Circuit concluded that there was no reason to believe "some forms of public funds to be more vulnerable than others." ___F.2d at ___(Appendix at A-11). Yet the Tenth Circuit had noted that:

> In the case of currency, its immediate liquidity provides the official with a variety of uses for the money, none of which could be traced so long as the official ultimately deposits the money. In the case of checks, however, the government official has little opportunity to misuse the funds they represent without negotiating the checks. Once the checks are negotiated, ample evidence would exist from which the government could bring an independent claim for conversion.

745 F.2d at 1330. These are valid distinctions, yet the Fourth Circuit never

addressed them in Jackson.

The Fernando analysis was similarly ignored when the Fourth Circuit considered whether the public interest will be adequately protected without judicial stretching of the term "money". For example, the Fourth Circuit felt that its broad construction of the term was necessary to deter the "misappropriation of virtually all remittances to the United States." ___F.2d at __(Appendix at A-12). However, virtually all forms of misappropriation by custodians are already prohibited by the very broad language of sections 641 and 648; and the Tenth Circuit stressed these other provisions in Fernando. Nevertheless, the Fourth Circuit did not address either the statutes or Fernando's analysis.

The net result of the Fourth Circuit's broad interpretation of Section

649 is that, so far as custodians are concerned, sections 641 and 648 are now virtually unnecessary. Since the misappropriation involved in sections 641 and 648 will often involve a failure to deposit, the government will prefer to use 649 becuase it will be simpler to prove a failure to deposit than to prove additional elements, such as knowing conversion, which are necessary for a conviction under Sections 641 and 648. It is respectfully submitted that a de facto elimination of sections 641 and 648 involves both an improper rewriting of the statutory scheme and an unnecesary broadening of criminal liability.

D. Conclusion

After making a comprehensive review of the available canons of interpretation of statutes, Karl Llewellyn concluded that the canons were so contradictory and

malleable that

> "...to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a simple contruction of the available language to achieve that sense...."

K. Llewellyn, The Common Law Tradition 521 (1960) (Emphasis in original). The use of legal deduction indicates clearly that the term money" in Section 649 encompasses currency and does not include checks.

First, the ordinary usage of the term "money" does not include checks.

Second, even if the term could somehow be interpreted to include checks, it is contrary to basic principles of criminal justice to adopt such a construction in an ex post facto manner.

Finally, it is not necessary to expand the term "money" beyond its

ordinary meaning. Other provisions provide ample protection of public funds, regardless of form.

Section 649 is very broad in the scope of conduct it criminalizes. Deliberately placing "money" in a desk drawer in a government office, rather than depositing it, is unlawful and subject to a fine and imprisonment of up to ten years. Conviction results even if the "money" is never converted or otherwise misused. Moreover, depositing the "money" at a later time does not matter -- the crime is complete at the time of the initial failure to deposit. Such a broad sweep and severe punishment may be necessary where currency is involved. However, it is unnecessary to interpret the statutory language in order to include checks within this very broad criminal statute.

III. Significant and Improper Expansion of Criminal Liability

Another important consideration in determining whether to grant certiorari is the effect that the Fourth Circuit's broad interpretation of Section 649 will have on the overall statutory scheme addressing misappropriation of federal funds. A review of the annotations following Sections 641 and 648 in United States Code Annotated suggests that these provisions are used far more than section 649. The crimes involved in Sections 641 and 648 involve elements in addition to mere failure to deposit -- e.g., conversion to personal use. Therefore, it is likely that if the Fourth Circuit's approach is not reversed, the government will shift from these carefully focused statutes to Section 649 because violations will be easier to prove. Under Section

649 the government will only have to prove that checks were not deposited. However, this ease of proof is not necessary where checks are involved because Sections 641 and 648 provide ample protection for misappropriation of checks. The net result will be that too wide a range of conduct will be subject to serious criminal sanction. Thus certiorari should be granted in this case so that the statutory scheme covering federal embezzlement will not be expanded beyond necessary bounds.

IV. Efficient Use of Judicial Resources

A final consideration relevant to a review of this petition is that although the issue is important, it is nonetheless relatively narrow and easy to resolve. There are virtually no significant factual disputes, and the question of statutory construction does not require the

extensive analysis that other legal issues might involve. As a result, granting certiorari in this case will not require a significant commitment of time and other resources. As a result, it will be an efficient means to resolve the dispute between the Circuit Courts of Appeal, correct error and an injustice, and prevent a substantial and irregular expansion of criminal liability.

Respectfully submitted this the 6th day of June, 1985.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CURCUIT

No. 84-5049

United States of America,

Appellee,

versus

Bernette Floyd Jackson,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Charles E. Simons, Jr., Chief District Judge. (CR 83-202).

Argued: November 2, 1985
Decided: April 9, 1985

Before PHILLIPS and SPROUSE, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Jack B. Swerling (Richard A. Harpootlian; Douglas K. Kotti on brief) for Appellant; Marvin J. Caughman, Assistant United States Attorney (Henry Dargan McMaster, United States Attorney; Alexander M. Bullock, Third Year Law Student on brief) for Appellee.

SPROUSE, Circuit Judge

Bernette Floyd Jackson appeals her convictions after jury trial of nineteen counts of violating 18 U.S.C. §649 (1982) by failing to make timely deposits of cash and checks paid to the United States. Jackson contends that the evidence was insufficient to support her convictions and that the trial court erred in allowing the government to introduce evidence of the loss of interest on the funds caused by her failure to make timely deposits, in admitting evidence concerning her personal financial difficulties, in interrupting her counsel's final argument, in denying her requested jury instructions, and in improperly charging the jury. Finding no merit to any of these contentions, we affirm.

Jackson was employed as a unit collection officer for the United States Forestry Service in Columbia, South

Carolina. Her duties included receiving funds remitted to the Forestry Service in payment for timber, maps, and recreation permits sold to the general public. The government alleged that from October 1981 through October 1982 Jackson failed on nineteen occasions to deposit remittances aggregating $759,116.77. Of this total, only $135 was indisputably in cash and $584.10 was by undetermined method of payment; the balance was remitted by check.[1] Jackson negotiated none of the checks; in fact, the government introduced no evidence that she appropriated any of the funds for personal use. Over Jackson's objection, however, the government introduced evidence that she was in personal financial distress, in

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[1]There was considerable conflict in the evidence adduced at trial over the method of remittance for several of the nineteen occasions at issue.

order to support its allegations concerning her motive to fail to deposit the funds.

Section 649(a) provides:

> Whoever, having money of the United States in his possession or under his control, fails to deposit it with the Treasurer or some public depositary of the United States, when required to do so by the Secretary of the Treasury of the head of any other proper department or agency or by the General Accounting Office, is guilty of embezzlement, and shall be fined in a sum equal to the amount of money embezzled or imprisoned not more than ten years, or both; but if the amount embezzled is $100 or less, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 649(a) (1982). The only issue raised by Jackson on this appeal that merits discussion is her contention that the evidence was insufficient to support her convictions on certain of the counts because checks payable to the United

States are not "money of the United States" so that the failure to deposit them does not violate 18 U.S.C. § 649(a).[2] Jackson argues that the phrase "money of the United States" means only currency and coin. Her contention gains support from a recent decision by the Court of Appeals for the Tenth Circuit holding that "money" as used in section 649(a) does not include checks payable to the United States. United States v. Fernando, 745 F.2d 1328 (10th Cir. 1984).

Analyzing the statute by viewing its text, its legislative history, prior interpretations, related statutes, and the underlying congressional purpose and

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[2]Jackson contends that this argument supports reversal even of the two convictions covering remittances which definitely included cash. She asserts that if presented with only two instances of misappropriation, the jury may have found mere mistake or inadvertence, whereas nineteen instances left the jury with no plausible explanation for her conduct except willful dereliction of duty.

public policy considerations,[3] however, leads us to the conclusion that "money" as used in section 649(a) includes checks payable to the United States.

"The starting point in every case involving construction of a statute is the language itself." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring). In the instant case the text affords little guidance, as it refers only to "money of the United States," without definition. 18 U.S.C. § 649(a). The statute goes on to state, however, that it applies to "all persons charged with the safe-keeping, transfer, or disbursement of the public money." 18 U.S.C. § 649(b) (emphasis supplied). This elaboration suggests that

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[3] See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197-214 (1976); Kernochan, Statutory Interpretation: An Outline of Method, 3 Dalhousie L.J. 333, 348-63 (1976)

the statute is concerned not with the form of the funds but instead with the public revenues of whatever form.

Dictionary definitions of statutory words that express commonly accepted meaning deserve some weight in the interpretive process, Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 617-18 (1944); Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 536-37 (1947). Dictionary definitions of "money," however, are not helpful in determining congressional intent in employing that term in section 649(a). Both Webster's and Black's indicate that the common meaning encompasses currency and coin, Webster's New Collegiate Dictionary 736 (1979); Black's Law Dictionary 906-07 (5th ed. 1979), but Webster's also defines money as "something generally accepted as a ... means of payment." Webster's at

736. Black's includes a subdefinition of "public money" as "[r]evenue received from federal, state, and local governments from taxes, fees, fines, etc.," wih no limit as to form. Black's at 907.

The legislative history of section 649 is equally unhelpful. There is nothing in committee reports, remarks on the floor of either House or any other legislative material relating to the enactment of section 649 and its substantially identical predecessors that contain any clue as to the scope of the term "money."

The paucity of prior constructions of section 649 further hampers the interpretive process. Aside from the Tenth Circuit's decision in Fernando, the meaning of "money" under section 649(a) has not been addressed by the courts. There are reported cases under a

substantially similar predecessor statute, Higgins v. United States, 185 F. 710 (6th Cir. 1911); Dimmick v. United States, 121 F. 2d 638 (9th Cir. 1903), but the nature of the funds misappropriated was not in issue in either case. In Dimmick the court spoke only of "lawful money of the United States," 121 F. at 640. In Higgins, however, the court affirmed a judgment for failure to deposit "money order funds," 185 F. at 711, without further specification. Neither court intimated that the application of the statute might turn upon the nature of the funds not deposited.

The Tenth Circuit in Fernando relied primarily upon a comparison of section 649 with other statutes. The court noted that section 649(a) uses the single term "money" while other statutes dealing with the misappropriation of United States

property specify it in more detail: e.g. 18 U.S.C. §641 (1982) ("record, voucher, money or thing of value"), 18 U.S.C. §654 (1982) ("money or property"), 18 U.S.C. § 655 (1982) ("money or property"), 18 U.S.C. § 655 (1982) ("money, note, draft, bond, or security or any other property of value"). The statutes compared in Fernando, however, were not enacted pursuant to any integrated legislative plan. They were, for the most part, based upon a variety of predecessor statutes, and there is no reason to suppose Congress intended them to comprise a consistent scheme for protecting the assets and revenues of the United States. In fact, the dearth of legislative history indicates that Congress enacted section 649 and its predecessors with little or no scrutiny of their relationship to other statutes, and we do not give significant

weight to differences in legislative drafting that result from inertia rather than choice.

We are left to analyze "the most significant factor in the interpretive process"--Congress' general purpose in enacting section 649. Kernochan, supra, at 353. The general purpose, or "true reason of the remedy," id. at 354, has been defined as "a more generalized sense of what the legislature was trying to do, why it did what it did." Id. at 353. It can hardly be gainsaid that the purpose of section 649 is to protect the public funds of the United States from loss by imposing criminal liability on employees who breach their duty to deposit public funds. Nothing suggests that Congress, in enacting section 649 or any of its predecessors, believed some forms of public funds to be more vulnerable than others. A failure to deposit either checks or cash involves similar risks-

possible loss of the funds, deprivation of the use of the funds for at least some period of time, and failure of proper record keeping.

In the period since 1846, when the progenitor of section 649 was enacted, [4] the use of checks and money orders to satisfy government obligations has completely overshadowed the use of currency. The funds involved in this case, for example, comprised over $750,000 in checks and no more than $750 in cash. We have found nothing to suggest that Congress, which has repeatedly enacted statutory language that originally clearly deterred the misappropriation of virtually all remittances to the United States, intended the scope of that deterrent to vary with the evolution of non-cash methods of settling commercial

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[4] 9 Stat. 59, 63.

transactions. To hold that section 649 proscribes the failure to deposit only cash would drastically narrow the protection of public funds provided by the statute and thereby "do violence to the purpose of Congress." United States v. Bramblett, 348 U.S. 503, 509 (1955). As the Supreme Court concluded in construing the statute in issue in Bramblett, "Congress could not have intended to leave [misfeasance] such as this without penalty." Id. We, therefore, conclude that checks constitute "money" as the term is used in section 649(a) and that the evidence amply supported Jackson's convictions on all nineteen counts.

Because we believe that Jackson's other contentions are also without merit, the judgment of the district court is in all respects

AFFIRMED.

(2)

No. 84-1914

Supreme Court, U.S.
FILED
SEP 17 1985
JOSEPH F. SPANIOL, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

BERNETTE FLOYD JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the term "money of the United States" in 18 U.S.C. 649(a) includes checks payable to the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1914

BERNETTE FLOYD JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 759 F.2d 342.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1985. The petition for a writ of certiorari was filed on June 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted on 19 counts of failing to deposit "money of the United States" in timely fashion, in violation of 18 U.S.C. 649. She was sentenced on the first count to one year's imprisonment with all but four months suspended in favor of five years' probation; sentence on the remaining counts was suspended. The court of appeals affirmed (Pet. App. A1-A13).

1. The evidence at trial, as summarized by the court of appeals (Pet. App. A2-A4), was as follows. Petitioner was a collection officer for the United States Forestry Service in Columbia, South Carolina. Her duties included receiving funds remitted to the Forestry Service in payment for timber, maps, and recreation permits sold to the general public. Between October 1981 and October 1982, petitioner failed 19 times to deposit remittances, together totalling $759,116.77. Of this total, $135.00 was in cash and $584.10 was by undetermined form of payment; the balance was remitted by check. Petitioner negotiated none of the checks; she did, however, have personal financial difficulties, which the government argued may have motivated her to fail to deposit the funds. Evidence was also introduced showing that the government lost approximately $56,000 interest as a result of petitioner's failure to deposit the funds in a timely fashion (C.A. Br. 8).

2. The court of appeals, affirming the convictions, held that a check is "money of the United States" within the meaning of Section 649. It found that Congress's "general purpose" of protecting public funds from loss would have been frustrated by limiting the term "money" to coin or currency (Pet. App. A11). "A failure to deposit either checks or cash involves similar risks—possible loss of the funds, deprivation of the use of the funds for at least some period of time, and failure of proper record keeping" (*id.* at A11-A12). The court concluded that, given the widespread use of checks, which has "completely overshadowed the use of currency," petitioner's interpretation of Section 649 "would drastically narrow the protection of public funds provided by the statute" (Pet. App. A12-A13). This, the court said, would do violence to the purpose of Congress, which could not have intended to leave misfeasance such as this without penalty (*id.* at A13).

ARGUMENT

Petitioner contends that the term "money of the United States" in Section 649 excludes checks. The court of appeals correctly rejected this contention, and the issue is not of sufficient importance to warrant review despite the existence of a conflicting decision.[1]

1. Section 649 prohibits the failure to deposit in timely fashion "money of the United States."[2] Statutory construction begins with the language of the statute, and statutory terms are given their ordinary and common meaning. *United States* v. *Albertini,* No. 83-1624 (June 24, 1985), slip op. 4-5; *Garcia* v. *United States,* No. 83-6061 (Dec. 10, 1984), slip op. 4 ("money" in 18 U.S.C. 2114 given ordinary meaning). The ordinary meaning of money is "something generally accepted as a medium of exchange, a measure of value, or a means of payment <have used gold, copper, wampum, or cattle for ~>". *Webster's Third New*

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[1]We note that the only count on which petitioner received jail time involved no allegations regarding checks; the money at issue was solely cash (Tr. 299-312, 558-559). As the petition concedes (Pet. 5-6,7), other counts involved cash as well. See also Pet. App. A5 n.2. Thus, even if petitioner were correct that only cash is covered by Section 649, it would not affect her sentence.

[2]Section 649 provides:

> (a) Whoever, having money of the United States in his possession or under his control, fails to deposit it with the Treasurer or some public depositary of the United States, when required so to do by the Secretary of the Treasury or the head of any other proper department or agency or by the General Accounting Office, is guilty of embezzlement, and shall be fined in a sum equal to the amount of money embezzled or imprisoned not more than ten years, or both; but if the amount embezzled is $100 or less, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> (b) This section and sections 643, 648, 650 and 653 of this title shall apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money, whether such persons be charged as receivers or depositaries of the same.

International Dictionary Unabridged 1458 (1981) (first definition). Obviously, this includes a check.

The legislative history of Section 649, while scant, supports this interpretation. The term "money of the United States" in Section 649 dates to the modification of the criminal code in 1909 (35 Stat. 1105); the original version of the prohibition used the term "moneys of the United States" (11 Stat. 249).[3] Similarly, both the predecessor of 18 U.S.C. 648 and the present version, which petitioner concedes now includes checks (Pet. 20-21), use the term "public moneys." See 9 Stat. 63. Moreover, Congress has never indicated that the term "money" should be narrowly construed. Rather, Congress's evident purpose in enacting this statute was to protect all of its public funds from embezzlement by ensuring their timely deposit into the Treasury.[4] Accordingly, there is no reason to exclude a check, a common form of money, from Section 649. Indeed, because checks constitute a substantial part of modern commercial transactions, a holding that "money" is limited to coin and paper currency would significantly expose a large portion of public funds to loss and "do violence to the purpose of Congress." *United States* v. *Bramblett*, 348 U.S. 503, 509 (1955).

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[3]The deletion of the letter "s" was not intended to have substantive significance. See H.R. Rep. 2, 60th Cong., 1st Sess. 17 (1908).

[4]The original version of Section 649 was an amendment to an 1846 "Act to provide for the better Organization of the Treasury and for the Collection, Safe-Keeping, Transfer, and Disbursement of the public Revenue" (9 Stat. 59-66). This Act, written in terms of "public moneys" and "public money," seems certainly to have included non-cash money in its scope. The House Report for the 1846 Act stated that "in this [United States] treasury, all the public money, however derived, must be received, and must be safely kept," and that "the money must be actually kept on hand, ready to be inspected and counted * * * and ready to be paid out * * *." H.R. Rep. 309, 28th Cong., 1st Sess. 3-4 (1844). The purpose of the 1846 Act also argues against a narrow reading of Section 649's predecessor, added 11 years later.

The other sections of Chapter 31 ("Embezzlement and Theft") in Title 18 use, variously, "money," "public money," "sum," "money or property," and other terms; there is no reason to suppose that in this statute the term used is to be more narrowly defined than the others. Indeed, Subsection (b) of Section 649 itself uses another term, "public money," as the Fourth Circuit pointed out (Pet. App. A6-A7). And, as discussed above, in its early days Section 649 itself used the term "moneys of the United States"; the legislative history of the original version used both "money" and "moneys." Cong. Globe, 34th Cong., 3d Sess. 713 (1857). Finally, a narrow reading of the word seems especially implausible where the other parts of Chapter 31 using the bare term "money"—Sections 645, 646, and 647—appear on their face clearly to encompass non-cash moneys.

2. As petitioner correctly notes, a different conclusion was reached by the Tenth Circuit in *United States* v. *Fernando*, 745 F.2d 1328 (1984). There, the court held that checks payable to the United States government were not "money of the United States" under Section 649. The court reasoned that when the progenitors of Section 649 were enacted, checks were not common; therefore, Congress likely intended the term "money" to apply only to paper currency. Moreover, in the Tenth Circuit's view, Congress may have intended only to reach coin or paper currency because their liquidity makes it possible for an official to misuse them more easily than a check and thus cause greater harm to the government than is likely from the failure to deposit a check.

a. We believe our own analysis and the analysis of the Fourth Circuit, discussed above, are more convincing. In any event, the rationale of *Fernando* is flawed even on its own terms. First, its assertion that checks were not as commonly used in the 19th century as today is an unpersuasive consideration. Checks were in substantial use in

principal commercial cities by the beginning of the 19th century. J. Hurst, *A Legal History of Money in the United States 1774-1970* at 35 (1973). Thus, checks were a common form of money even when Congress enacted the progenitors of Section 649. By adopting the broad term "money" instead of specifying "coin" or "paper currency," Congress can reasonably be supposed to have intended to reach all forms of money.[5] Second, *Fernando's* assertion that Congress may have wanted to reach only funds that could be the most easily misused is speculative. Given the plain meaning of the term "money," to narrow the statute "on the basis of a gestalt judgment" as to Congress's intent is unreasonable. See *Garcia, supra,* slip op. 9. As cogently stated by the Fourth Circuit in this case (Pet. App. A11-A12):

> It can hardly be gainsaid that the purpose of section 649 is to protect the public funds of the United States from loss by imposing criminal liability on employees who breach their duty to deposit public funds. Nothing suggests that Congress, in enacting section 649 or any of its predecessors, believed some forms of public funds to be more vulnerable than others. A failure to deposit either checks or cash involves similar risks—possible loss of the funds, deprivation of the use of the funds for at least some period of time, and failure of proper record keeping.[6]

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[5]In any event, it is not explained why, if the common meaning of the term "money" had changed when Congress reenacted this statute, the earlier rather than the later meaning should control. If anything, as the meaning of the term "money" changed and the need to include checks to achieve the objectives of the statute became apparent, one would expect "money" to mean what it meant at the time of reenactment. Moreover, "even a criminal statute embraces everything which subsequently falls within its scope." *Browder* v. *United States*, 312 U.S. 335, 340 (1941) (citations omitted).

[6]The other two bases for the decision in *Fernando* — that some state courts use the narrow definition of money, and that Section 649 need not be interpreted broadly since other embezzlement statutes are

b. The conflict between this case and *Fernando* does not in any event merit this Court's review. This is a seldom-used statute. The annotation to Section 649 contains only four other cases (cf. Pet. 24), all decided more than 70 years ago.[7] The Department of Justice is aware of no other prosecution currently being conducted under this statute. This is not surprising. A custodian who fails to deposit government funds usually intends to convert those funds and takes fairly prompt steps to do so; such individuals can be and usually are prosecuted under Section 641 or 648. Using Section 649 makes sense only in the rare circumstances of a custodian who neither deposits the money nor converts it to her own use. And, of course, the conflict concerns only that small subclass of potential Section 649 prosecutions in which the custodian inexplicably retains money in the form of checks payable to the United States.[8]

The recentness of the split which has developed would also make review by this Court premature. Only the Fourth and Tenth Circuits have had to rule on the proper definition

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broad—are also unconvincing. The relevance of the state law cited in this context is attenuated, and the fact that other offenses could be prosecuted under other statutes is irrelevant.

[7]They are: *United States* v. *Mason*, 218 U.S. 517 (1910); *Higgins* v. *United States*, 185 F. 710 (6th Cir. 1911); *Dimmick* v. *United States*, 121 F. 638 (9th Cir.), cert. denied, 191 U.S. 574 (1903); *United States* v. *Greene*, 146 F. 778 (E.D. Ga. 1906).

[8]Petitioner raises the specter of Section 649 rendering Sections 641 and 648 "virtually unnecessary," but then implicitly recognizes why this has not been so (Pet. 20-21): Section 649 is limited on its face to a very small class of people and a very special sort of offense—where those who are required to deposit money with the Treasurer or some public depositary fail to do so. It is also unclear why, from a public policy standpoint, the prosecution of individuals like petitioner is "improper" (Pet. 23, 24-25). We note that the amounts involved in both this case and *Fernando* were quite substantial—$759,000 and $787,000 respectively.

of the term "money" in Section 649.[9] Should another case arise, the government expects to argue that the Tenth Circuit should reevaluate its decision in light of the court of appeals' decision in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1985

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[9] *Higgins* v. *United States*, *supra*, affirmed a judgment for failure to deposit "money order funds," but the precise issue of what "money order funds" were and whether they constituted "money" was not discussed.

EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

BERRETTE FLOYD JACKSON *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1914. Decided October 21, 1985

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

Title 18 U. S. C. §649(a) makes it a crime for one having "money of the United States" under her control to fail to deposit it when required to do so. Petitioner, who was convicted under this statute, argued on appeal that the evidence on certain counts was insufficient because it showed only her failure to deposit checks payable to the United States. The United States Court of Appeals for the Fourth Circuit rejected petitioner's argument that checks are not "money of the United States" for purposes of §649(a). This holding conflicts with the Tenth Circuit's interpretation of the statute. See *United States* v. *Fernando*, 745 F. 2d 1328 (CA10 1984) (strictly construing "money of the United States" to include only currency and not negotiable documents). I would grant certiorari to resolve this conflict between two courts of appeals.